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# Selected Labor & Employment Law Updates

*compiled by* Book Review/Updates Editor

This section of the *Journal* provides notes on recent cases, pending or newly enacted legislation, and other current legal materials. The Updates section is designed to aid the practitioner in relating the *Journal* articles to the daily practice of labor and employment law. The *Journal* welcomes outside submissions of brief judicial and legislative summaries.

*Supreme Court holds that California Labor Code authorizing the withholding of payments due a contractor on a public works project did not violate due process, by providing for a hearing. Lujan v. C & G Fire Sprinklers, 532 U.S. 200 (2001).*

The California Labor Code authorizes the State to order the withholding of payments due a contractor on a public works project if a subcontractor on the project fails to comply with certain Code requirements. The Code also permits the contractor, in turn, to withhold similar sums from the subcontractor. Finally, the Code allows the contractor, or the contractor's assignee, to recover the wages or penalties withheld by suing the awarding body for breach of contract in not making payment. The Supreme Court held that the breach of contract suit was sufficient to fully protect C & G's property interests.

*Supreme Court holds that a complaint about an isolated sexually suggestive comment by a supervisor was "protected conduct" under Title VII. Clark County School Dist. v. Breeden, 532 U.S. 268 (2001).*

Breeden claimed that she was retaliated against for complaining about a sexually suggestive comment by a supervisor. The trial court granted summary judgment in favor of the employer and the Ninth Circuit reversed. The Ninth Circuit interpreted Title VII as protecting an employee's opposition to both practices actually deemed unlawful by Title VII, and practices that the employee reasonably believed were unlawful.

The Supreme Court did not address that interpretation, stating "we

have no occasion to rule on the propriety of this interpretation, because even assuming it is correct, no one could reasonably believe that [this] incident . . . violated Title VII.” The Court held that any punishment suffered by Breeden for complaining did not constitute actionable retaliation since the incident was isolated and could not be deemed sufficiently severe and pervasive as to alter the terms and conditions of Breeden’s employment. Thus, the incident did not constitute protected activity. The Supreme Court reversed the Ninth Circuit in a per curiam opinion.

*Supreme Court holds that Ninth Circuit reversal and remand with instructions that arbitrator enter an award for plaintiff usurped the arbitrator’s fact finding role. Major League Baseball Players Assoc. v. Garvey*, 121 S. Ct. 1401 (2001).

Garvey brought a claim under the Global Settlement Agreement, which established a fund to be distributed to baseball players injured by baseball clubs’ collusion in the market for free-agent services. The agreement provided for arbitration to review distributions of the fund. After an arbitrator denied his claim, Garvey moved to vacate the arbitrator’s award.

The trial court denied the motion. The Ninth Circuit reversed with directions to vacate the award, holding that the arbitrator, who denied Garvey’s claim largely because of credibility determinations, had “dispensed his own brand of industrial justice.” The trial court remanded to the arbitrator for further hearings, and Garvey appealed. The Ninth Circuit again reversed and directed the trial court to remand the case to the arbitrator with instructions to enter an award for Garvey.

The Supreme Court held that “even in the very rare instances when an arbitrator’s procedural aberrations rise to the level of affirmative misconduct, as a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result . . . [t]hat step ‘would improperly substitute a judicial determination for the arbitrator’s decision that the parties bargained for’ in their agreement. Instead the court should ‘simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement.’”

The Supreme Court held that the substance of the Ninth Circuit’s decision reveals that the court overturned the arbitrator’s decision because it disagreed with the arbitrator’s factual findings with respect to credibility. The court held that this was improper because even serious error on the arbitrator’s part does not justify overturning his decision where he is construing a contract and acting within the scope of his authority. The

Supreme Court reversed without briefing or oral arguments.

Justice Stevens dissented, stating that prior Supreme Court cases do not provide significant guidance as to what standards to use in deciding whether an arbitrator's behavior is an attempt to "dispense his own brand of industrial justice." Stevens also stated that prior cases do not establish that the only course open for a reviewing court is to remand for another arbitration. Stevens concluded that he was unable to endorse the conclusion that the arbitrator did not commit serious error without reviewing the record or soliciting briefing.

*Supreme Court rejects NLRB's method of analyzing whether charge nurses are supervisors. NLRB v. Ky. River Comty. Care*, 121 S. Ct. 1861 (2001).

The NLRB upheld certification of a nurses' union in the face of the employer's claim that its registered nurses were supervisors, and thus fell under the NLRA exception for supervisors. The Sixth Circuit reversed. The Supreme Court affirmed the Sixth Circuit's judgment, rejecting the employer's argument that the burden of proof is on the NLRB's General Counsel to prove that the nurses are not supervisors.

The Supreme Court found that the NLRB's test for determining supervisory status is inconsistent with the National Labor Relations Act. One of the three statutory factors that determine whether employees are supervisors is the use of "independent judgment" in exercising their authority. The NLRB's position was that employees do not use "independent judgment" when they exercise "ordinary professional or technical judgment in directing less skilled employees to deliver services in accordance with employer-specified standards."

According to the Supreme Court, one flaw in the NLRB's interpretation was that it distinguished between different kinds of judgment, regardless of the degree of judgment. A second flaw was that the NLRB applied its categorical exclusion to only one of the twelve supervisory functions, the "responsibility to direct." The Court noted that it was particularly troubled that the NLRB refused to apply its interpretation of "independent judgment" to any supervisory function other than "responsibly directing" other employees because of a similar one-function analysis in *NLRB v. Health Care & Ret. Corp.*, 511 U.S. 571 (1994).

Justices Stevens, Souter, Ginsburg, and Breyer dissented, stating that the NLRB's test was "both fully rational and entirely consistent with the Act." They went on to say that since the term "independent judgment" is ambiguous, the NLRB's interpretation is entitled to deference.

*Supreme Court holds that corporations and their sole owners/employees are distinct entities under RICO. Cedric Kushner Promotions v. Don King*, 121 S. Ct. 2087 (2001).

Kushner, under the Racketeer Influenced and Corrupt Practices Act (RICO), sued King, the president, sole shareholder, and employee of Don King Productions. RICO makes it “unlawful for any person employed by or associated with any enterprise . . . to conduct or participate [in RICO-prohibited activity] . . . in the conduct of such enterprise’s affairs.” Prior legislation and case law has established that in order to have a RICO violation there must be two separate entities – a “person” engaging in RICO-prohibited conduct, and a distinct “enterprise.”

The trial court dismissed King’s claim and the Second Circuit affirmed, concluding that King was a part of the corporation/enterprise and that there was no person distinct from the enterprise. The primary issue on appeal to the Supreme Court was whether King was a “person” distinct from the corporation/enterprise when he engaged in alleged RICO-prohibited conduct.

The Court disagreed with the Second Circuit’s conclusion that King had not acted as a “person” distinct from the corporation/enterprise. The Court stated, “the corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more ‘separateness’ than that.” The Court reversed the Second Circuit, holding that “the need for two distinct entities is satisfied . . . when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner – whether he conducts those affairs within the scope, or beyond the scope, of corporate authority.”

*Supreme Court holds that back wages are subject to FICA and FUTA taxes in the year the wages are actually paid. United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001).

An employer paid backpay in 1994 for wages that were due in 1986 and 1987 under a grievance settlement. The Supreme Court, deferring to the Internal Revenue Service’s interpretation, held that back wages are subject to FICA and FUTA taxes by reference to the year the wages were in fact paid.

*Ninth Circuit holds that ERISA’s “reasonable compensation” provision does not apply to fiduciary self-dealing. Patelco Credit Union v. Sahni*, 2001 U.S. App. LEXIS 19165 (9th Cir. Aug. 27, 2001).

The Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1106(b) prohibits fiduciary self dealing, but does not mention § 1108, which provides that fiduciaries may receive reasonable compensation for their services in certain instances. In considering the applicability of § 1108 to § 1106(b), the *Patelco* court concluded that “the reasonable compensation provision does not apply to fiduciary self-dealing . . .”

*Second Circuit holds that the definition of an employee’s desired “position” under the ADA can include specific locations and shifts. Lovejoy-Wilson v. Noco Motor Fuel, 2001 U.S. App. LEXIS 19511 (2d Cir. Aug. 31, 2001).*

Lovejoy-Wilson, who suffered from epilepsy, worked as a clerk at a Noco Motor Fuel gas station. When Noco failed to promote her to assistant manager of her store, Lovejoy-Wilson sued Noco for disability discrimination in violation of the Americans with Disabilities Act (ADA). Noco claimed that a valid driver’s license was necessary to perform the management job at Lovejoy-Wilson’s desired location. The Second Circuit reversed the trial court’s grant of summary judgment in favor of the employer.

The ADA defines a qualified individual with a disability as one, “who with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8). The court noted that “it is discriminatory and a violation of the ADA to fail to ‘make reasonable accommodations to the known physical . . . limitations of an otherwise qualified individual with a disability who is an applicant’ for an employment position.”

Noco argued that it had reasonably accommodated Lovejoy-Wilson by promoting her to the assistant-manager position at a store where a driver’s license was not required. The trial court agreed. At issue on appeal was whether Lovejoy-Wilson had been promoted to her desired “position” and thus reasonably accommodated.

The ADA does not specify whether “position” refers to the level of a job, or to the level of a job on a desired shift, or at a specific location. According to the court, the answer depends on what the evidence in each case shows as to the job opportunities for those without disabilities. Essentially, if employees without disabilities are entitled to compete for positions at desired locations or on desired shifts, then disabled employees must be allowed to compete equally for those positions. In those circumstances, the term “position” includes desired shifts or locations.

Evidence in the Lovejoy-Wilson case indicated that employees without disabilities could apply for promotions at particular stores. Thus,

the circuit court held that the trial court erred in concluding that Noco had reasonably accommodated Lovejoy-Wilson by promoting her to assistant manager at a location that she did not desire.